

IN THE CIRCUIT COURT OF THE \_\_\_\_  
\_\_\_\_ JUDICIAL CIRCUIT IN AND  
FOR \_\_\_\_\_ COUNTY, FLORIDA

Circuit Civil Division

Case No.:

Plaintiff(s),

v.

Defendant(s).

\_\_\_\_\_ /

**STANDING ORDER ON ESI DISCOVERY**

Pursuant to Florida Rule of Civil Procedure 1.200 [and based upon the matter designation appearing on the Form 1.997 (Civil Cover Sheet) filed with this action] the Court hereby *sua sponte*

**ORDERS and ADJUDGES:**

1. Plaintiff's/Petitioner's counsel shall serve this Order upon counsel for Defendant(s)/Respondent(s) within ten (10) days of the first appearance of counsel for each such Defendant/Respondent, and shall schedule a Meet and Confer with, and among, all such counsel within 60 days of the first Defendant/Respondent being served.

2. Unless good cause otherwise exists, the parties shall not seek the Court's intervention on matters involving ESI discovery prior to completion of the initial Meet and Confer. Such matters should be initially addressed before the Court at a Case Management Conference to be scheduled on the Court's Uniform Motion Calendar no later than ten (10) days after the Meet and Confer. Subsequent hearings for determination of more complex ESI matters may be scheduled at that time. **[This provision may be left out if alternative provision 32, below, is preferred]**

3. If the parties determine by mutual agreement that, owing to the limited nature of the issues and/or circumstances likely involved in the case, the ESI discovery procedures and considerations outlined below are ***entirely*** inapplicable, the parties may opt out of compliance with this Order after service of the same has been completed. Election to opt out shall be by written stipulation signed by all counsel and filed with the Court within sixty (60) days of the first Defendant/Respondent being served with the Order. Counsel's signature shall constitute a certification as officer of the Court that he/she is sufficiently familiar with the issues and/or circumstances likely involved in the case and has made an independent determination that the ESI discovery topics and considerations outlined below are substantially, if not entirely, inapplicable.

**Before the Meet and Confer, counsel for the parties shall:**

4. Make an initial assessment regarding whether the client's personal/business smart phone(s) or other mobile computing and storage devices (e.g. tablets, laptops, smart watches, Fitbits, thumb drives, on-board data recorders, etc.) are likely to contain discoverable ESI, and consider taking steps to preserve the same.

5. Make an initial assessment regarding whether the client's social media accounts (FaceBook, SnapChat, Twitter, Linked-In, Tumblr, WhatsApp, etc.) or other cloud-based, third-party service provider accounts (e.g. mobile banking, Paypal, eBay, Shutterfly, etc.) are likely to contain discoverable ESI, and consider taking steps to preserve the same. Because many of these applications involve an ever-increasing level of functionality and cross-platform or device integration, it is particularly important for counsel to understand how the applications being used by the client operate and the use the client routinely makes of each, if any.

6. Make an initial assessment of any other the types and/or sources of ESI within

the possession, custody or control of the client that is likely to be discoverable.

7. With respect to business clients, identify the client's IT management personnel and discuss with them how relevant ESI is routinely generated, shared and stored by the business, with an emphasis on understanding the likely process(es) and challenges inherent in locating and retrieving such information, including the client's in-house capability/capacity to realistically/appropriately assist with performing these functions.

8. Make an initial assessment of the client's document retention plan (including routine deletion/archiving schedules) or default data management habits and practices, and consider the need for any temporary suspensions as part of a litigation hold. This determination extends to individual clients in non-commercial contexts who may routinely use Internet-based email accounts (e.g. Gmail, Yahoo, Hotmail, etc.) or FTP-sites (e.g. DropBox, One Drive, Google Drive, etc.) with default and customizable deletion, retention and/or archiving functions and settings.

9. Ensure that the client has been issued notice of any necessary litigation holds regarding the need to preserve identified categories of ESI and follow up to confirm the client's initial and ongoing compliance. An effective litigation hold notice is one that provides the client with clear and definitive instructions at the ESI custodian's level for identifying and designating targeted ESI for preservation/non-deletion and requires the complying custodian to affirmatively indicate his or her compliance in response.

10. Determine the extent to which any relevant hard copy documents or ESI may have already been lost or destroyed, including the specific circumstances surrounding any such loss or destruction.

11. Discuss with the client the identity and character of all known or anticipated ESI

to be requested from the opposing party and/or relevant third parties, including ESI types, sources, quantity, locations, accessibility, relevant time frames and the extent to which the ESI sought is still being actively utilized in the ordinary course.

12. Make an initial assessment as to whether the complexity or extent of ESI issues likely involved in the case requires hiring a third-party eDiscovery expert and/or eDiscovery co-counsel to ensure compliance with professional standards of competency in this area of the law.

**To further prepare for the Meet and Confer, counsel shall:**

13. Determine and be prepared to discuss foreseeable personal privacy issues implicated by potential ESI sources such as the client's personal mobile computing and storage devices or the client's personal online social media activity. Adequate preparation should include identification of primary or alternate sources of the same ESI that limit or do not implicate privacy concerns; identification of the make (e.g. iPhone or Samsung) and operating system/version (e.g. iOS 10 or Android 9.0) of the relevant computing devices in use; determination of the features and functionality of relevant social media/mobile applications in use; and understanding of the client's historical utilization of any such relevant devices or applications, including for limited or multiple purposes, degree of connectivity with other devices and management of privacy and back-up settings.

14. Identify witnesses and records custodians (specifically or categorically) who are believed to have generated, received, and/or maintained potentially discoverable categories of ESI relevant to the claims and/or defenses set forth in the pleadings. In complex or large business enterprise contexts, designate a client ESI liaison through which to manage and supervise compliance with eDiscovery-related tasks and obligations.

15. Further define the nature and extent of the client's sources of potentially

discoverable ESI, and determine whether any such sources should be identified as not “reasonably accessible” within the meaning of Fla. R. Civ. P. 1.280(d)(1). This designation must be based upon counsel having an adequate understanding of the specific barriers to accessibility involved, including logistical, technological and economic considerations.

16. Determine the methodology/technical protocol likely best suited to the efficient and forensically sound collection of the client’s ESI, including the ability to provide auditable proof of proper collection. Client self-collection is rarely, if ever, appropriate and can constitute a breach of counsel’s professional obligations. Consider whether the complexity or extent of the client’s likely ESI collection, review or production issues require hiring a third-party eDiscovery expert and/or eDiscovery co-counsel to ensure compliance with professional standards of competency in this area of the law.

17. Make an initial assessment as to the preferred format in which to produce your client’s ESI and the preferred format in which to receive ESI production from the opposing party, taking into account such factors as: (a) whether dynamic file formats (e.g. Excel, PowerPoint, etc.) or proprietary, video or internet file formats (e.g., CAD, FaceBook, AVI, HTML, etc.) are anticipated; (b) the amount of data likely to be produced; (c) the relevance of metadata to authenticity and searchability; (d) the flexibility of hosting tools and review platforms to be used, if any; (e) the use of legal service and/or eDiscovery vendors; (f) and costs.

18. Determine whether potentially discoverable ESI important to the case is generated or maintained by the client or opposing party in a business database application (e.g. QuickBooks, CAD, Timberline, SAP, NextGen, SalesForce, etc.) and confer with client custodian as to the application’s ability/flexibility to run and generate informational reports.

19. Determine what resources will be needed to perform relevancy and privilege

reviews of ESI, the method for electronic redaction and/or designation of confidential materials, document control identification (electronic Bates numbering), and what would constitute a duplicate or near-duplicate for purposes of excluding or including in the collection or production phases.

20. Compile a list of proposed keyword search terms and phrases for discussion at the Meet and Confer as well as any other search parameters, such as Boolean modifiers, limiting time frames, custodian or user groups, and excludable file types. Also consider whether there is a basis for suggesting the parties pursue a phased or prioritized approach to some or all of the likely ESI at issue and whether a more sophisticated search methodology should be considered, such as algorithm-based technology assisted review.

21. Consider and prepare proposed confidentiality agreements and claw back agreements for consideration at the Meet and Confer and whether one eDiscovery vendor can be shared between the parties to centralize processing and review and cut down on costs.

**NOTE: Attached hereto as Exhibit “A” is a proposed Stipulation Establishing Electronic Discovery Protocol developed by members of the Florida Bar and former members of the Florida judiciary having considerable expertise in the area of eDiscovery. This form is provided herewith for informational purposes only.**

**At the Meet and Confer, counsel shall:**

22. Meet and Confer: The intensity of the reasonably anticipated ESI issues should generally dictate the scope of the Meet and Confer in terms of time set aside, necessary persons in attendance, and prepared materials and information on hand. A client representative with appropriate knowledge should almost always be in attendance or immediately available by phone. The Meet and Confer ***is not*** the first time counsel should be considering or gathering information

concerning the items listed in provisions 3 through 21 of this Order, *supra*.

23. ESI in general: Determine the extent to which discovery will likely include ESI, including a fulsome discussion of the clients' relevant use of mobile communication and computing devices, social media activity and accounts, home computing devices and cross-platform, cross-device and/or cloud computing usage. In commercial contexts, counsel should also discuss the basic structure of their clients' computing systems/environment, relevant software, database and data distribution issues, any relevant Internet presence or activity, and any implicated data privacy compliance concerns. Counsel shall attempt to agree upon steps each side will take to segregate and preserve ESI to avoid accusations of spoliation or creation of unnecessary burden and expense. This discussion may require the voluntary disclosure of types and sources of responsive or likely discoverable ESI maintained by or on behalf of the client and/or the steps already taken to segregate and/or preserve such ESI. Counsel should also determine whether this matter should be considered Complex Litigation pursuant to Rule 1.201.

24. E-mail: Counsel shall attempt to agree upon the scope of e-mail discovery and e-mail search protocol through initial search terms/concepts/parameters and other search methodologies, including technology assisted review. At the very least, counsel must be prepared to intelligently discuss the following: (a) the basic characteristics of the client's email technology, distribution and use; (b) initial search parameters/concepts such as date ranges, key email user/custodian addresses, unique terms, nomenclature and proper nouns, and any known terms or criteria prone to false hits; (c) likely importance or value of email threading and maintaining parent/child relationships with email attachments; (d) importance of searchability within email attachments; (e) and specific fields of metadata to be captured.

25. Deleted information: Counsel shall attempt to agree on whether there is responsive

or likely discoverable information that has, or may have been, deleted, the extent to which recovery of this deleted information is important to the determination of a material fact at issue in the case, and how the costs of restoration of such deleted information shall initially be borne subject to taxation at the end of the case, if appropriate.

26. Embedded data and metadata: Counsel shall discuss whether embedded data or metadata exists with respect to any responsive or likely discoverable information, whether it will be (or has been) requested and produced, and how to handle determinations of privilege or protection of work product.

27. Back-up and archival data: Counsel shall attempt to agree on whether responsive or likely discoverable back-up and/or archival data exists, the extent to which such data is needed, the issues known or to be determined with respect to the restoration and search of such data and who will bear the cost of obtaining such data. Please also refer to provision 29 of this Order, *infra*.

28. Format: Counsel shall attempt to agree on the format or formats to be used in the production of ESI and on Bates numbering or other document control identifiers. Based upon the ESI likely to be produced, counsel may consider the use of an internet-based repository or review platform where ESI from all parties can be hosted and reviewed and the costs shared subject to taxation at the end of the case, if appropriate.

29. Reasonably accessible information and costs: The Court expects that most parties' discovery needs will be satisfied from reasonably accessible sources. Counsel shall attempt to determine if responsive ESI is not reasonably accessible because of undue burdens and costs, including whether the burden/cost are the result of ordinary course circumstances or otherwise. If either side intends to seek discovery of ESI that is not reasonably accessible, counsel shall discuss: (a) the burdens and costs of accessing and retrieving the information; (b) the needs that may



establish good cause to require production of all or part of the information, bearing in mind controlling concepts of proportionality; and (c) conditions to obtain and produce this type of information such as scope, time frame and allocation of costs.

30. Privileged or trial preparation materials: Counsel shall attempt to reach an agreement about what will happen in the event that privileged or trial preparation materials are inadvertently disclosed. *See* Fla.R.Civ.P. 1.285. Counsel may agree to employ a “quick peek” methodology whereby the responding party provides certain requested materials for initial examination without waiving any privilege or objection. Counsel may also agree to a “clawback agreement” whereby materials that are inadvertently disclosed are returned to the responding party.

31. Sequence of Production: Counsel shall address the most efficient process(es) to search, collect, preserve and produce ESI. A rolling production should be considered if the volume of production is likely to be significant. Further, the parties should consider phasing discovery by first producing ESI from sources and custodians that have the most relevant information.

**For the Joint Case Management Report, counsel shall:**

32. At least five (5) business days prior to the initial Case Management Conference required by provision 1 of this Order, *supra*, counsel shall draft and file a joint report regarding all matters involving the anticipated course of discovery, including the results of their initial ESI Meet and Confer. Any stipulations reached at the Meet and Confer regarding the scope, conditions or protocol for preserving, searching, collecting, and/or producing ESI in this case should be filed prior to the initial Case Management Conference as well. *See* Fla.R.Jud.Admin. 2.505(d) and Exhibit “A,” attached.

33. To the extent the parties are not able to resolve or adequately address all identified or reasonably anticipated preliminary discovery issues involving ESI at the initial Meet and

Confer, the joint report shall contain a detailed description of the unresolved or open issues, the specific circumstances believed to be inhibiting resolution, and, where possible, any proposed courses of action or “next steps.”

**Alternatively:**

32. Counsel for the parties shall **jointly** prepare, execute and file a short Notice of Compliance confirming that they have met the requirements of this Order. If the Notice of Compliance is filed within ten (10) days of the Meet and Confer, counsel for the parties need take no further action to comply with this Order, absent further motion by the parties or order of this Court. If Notice of Compliance is not filed with the ten days, Plaintiff/Petitioner shall notice a Case Management Conference pursuant to 1.200(a) for Uniform Motion Calendar to address the specific issues that have resulted in the lack of compliance.

ORDERED in Chambers at \_\_\_\_\_, Florida on \_\_\_\_\_, 2018.

Exhibit "A"

**STIPULATION ESTABLISHING  
ELECTRONIC DISCOVERY PROTOCOL**

**I. DEFINITIONS**

A. **“Electronically stored information,”** or **“ESI,”** as used herein, means and refers to computer generated information or data of any kind, stored in or on any storage media located on computers, file servers, disks, tape or other real or virtualized devices or media. Non limiting examples of ESI include:

- Digital Communications (e.g., e-mail, voice mail, instant messaging, tweets, etc.);
- E-Mail Server Stores (e.g., Lotus Domino .NSF or Microsoft Exchange .EDB);
- Word Processed Documents (e.g., Word or WordPerfect files and drafts);
- Spreadsheets and tables (e.g., Excel or Lotus 123 worksheets);
- Accounting Application Data (e.g., QuickBooks, Money, Peachtree data);
- Image and Facsimile Files (e.g., .PDF, .TIFF, .JPG, .GIF images);
- Sound Recordings (e.g., .WAV and .MP3 files);
- Video and Animation (e.g., .AVI and .MOV files);
- Databases (e.g., Access, Oracle, SQL Server data, SAP, other);
- Contact and Relationship Management Data (e.g., Outlook, ACT!);
- Calendar and Diary Application Data (e.g., Outlook PST, blog entries);
- Online Access Data (e.g., Temporary Internet Files, History, Cookies);
- Presentations (e.g., PowerPoint, Corel Presentations);
- Network Access and Server Activity Logs;
- Project Management Application Data;
- Computer Aided Design/Drawing Files; and
- Backup and Archival Files (e.g., Veritas, Zip, .GHO).

B. **“Native data format”** means and refers to the format of ESI in which it was generated and/or as used by the producing party in the usual course of its business and in its regularly conducted activities.

C. **“Metadata”** means and refers to information about information or data about data, and includes, without limitation: (i) information embedded in or associated with a native file that is not ordinarily viewable or printable from the application that generated, edited, or modified such native file which describes the characteristics, origins, usage and/or validity of the

electronic file and/or (ii) information generated automatically by the operation of a computer or other information technology system when a native file is created, modified, transmitted, deleted or otherwise manipulated by a user of such system.

**D. “Static Image”** means or refers to a representation of ESI produced by converting a native file into a standard image format capable of being viewed and printed on standard computer systems.

**E. “Documents”** includes writings, drawings, graphs, charts, photographs, sound recordings, images, and other data, data records or data compilations — stored in any medium (including cloud-based or cloud sourced media) from which information can be obtained.

**F. “Media”** means an object or device, real or virtualized, including but not limited to a disc, tape, computer or other device, on which data is or was stored.

## **II. SEARCH TERMS FOR ELECTRONIC DOCUMENTS**

The parties agree that they will cooperate in good faith regarding the disclosure and formulation of appropriate search methodology, terms and protocols in advance of any ESI search. With the objective of limiting the scope of review and production, and thereby reducing discovery burdens, the parties agree to meet and confer as early as possible, and in advance of any producing party search commencement, to discuss, *inter alia*:

- Search methodology (Boolean, technology assisted review)
- Pre-search-commencement disclosure of all search terms, including semantic synonyms. Semantic synonyms shall mean without limitation code words, terms, phrases or illustrations, acronyms, abbreviations, or non-language alphanumeric associational references to relevant ESI, or information that may lead to relevant ESI.
- Search protocol (algorithm selection, etc.)
- Post-search error sampling and sampling/testing reports.

The parties will continue to meet and confer regarding any search process issues as necessary and appropriate. Nothing in this protocol, or the subsequent designation of any search terms,

shall operate to limit a party's obligations under the Florida Rules of Civil Procedure and applicable decisional authority to otherwise search for and produce any requested non-privileged relevant evidence, or information that could lead to relevant evidence. This ESI protocol does not address or resolve any other objection to the scope of the parties' respective discovery requests.

### **III. FORMAT OF PRODUCTION**

**A. Native File Format.** The parties agree that production will be made in native format, as the ESI exists on the producing party's computer system. Where structured data (e.g., data from a database) is requested, appropriate queries will be used to extract relevant data from any such database, which data shall match specified criteria, and returning specified fields, in a form and format that is verifiably responsive and readable by the use of commonly available tools. If a producing party asserts that certain ESI is inaccessible or otherwise unnecessary or inadvisable under the circumstances, or if the requesting party asserts that, following production, certain ESI is not reasonably usable, the parties shall meet and confer with their respective technology experts to discuss resolving such assertions. If the parties cannot resolve any such disputes after such a meet and confer has taken place, the issue shall be presented to the Court for resolution.

**B. Document Image Format.** Unless otherwise agreed to in writing by a requesting party, ESI shall be produced in native data format, together with all associated metadata. In such cases where production in native format is not possible or advisable (e.g., redacted documents), native format files shall be converted to static images and each page thereof saved electronically as a single-page "TIFF" image that reflects how the source document would have appeared if

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printed out to a printer attached to a computer viewing the file. Accompanying this TIFF shall be a multipage text (.TXT) file containing searchable text from the native file, and the metadata as discussed later in this document. Load files of the static images should be created and produced together with their associated static images to facilitate the use of the produced images by a document management or litigation support database system. If voluminous TIFF production is anticipated, the parties shall meet and confer to determine how such production is to be made reasonably usable by the requesting party. The parties shall meet and confer to the extent reasonably necessary to facilitate the import and use of the produced materials with commercially available document management or litigation support software.

**C. Production of Physical Documents.** Documents or records which either were originally generated or instantiated as ESI but now only exist in physical hard-copy format, or documents or records that were originally generated in hard-copy format shall be converted to a single page .TIFF file and produced following the same protocols set forth herein or otherwise agreed to by the parties.

**D. Document Unitization.** For file or records not produced in their native format, each page of a document shall be electronically saved as an image file. If a document consists of more than one page, the unitization of the document and any attachments and/or affixed notes shall be maintained as it existed in the original when creating the image files.

**E. Duplicates.** To the extent that exact duplicate documents (based on MD5 or SHA-1 hash values) reside within a party's ESI dataset, each party is only required to produce a single copy of a responsive document or record. ESI with differing file names but identical hash values shall not be considered duplicates. Exact duplicate shall mean bit-for-bit identity with both document content together with all associated metadata. Where any such documents have

attachments, hash values must be identical for both the document-plus-attachment (including associated metadata) as well as for any attachment (including associated metadata) standing alone. If requested, the parties will produce a spreadsheet identifying additional custodians who had a copy of the produced document.

**F. Color.** For files not produced in their native format, if an original document contains color, the producing party shall produce color image(s) for each such document if reasonably feasible.

**G. Bates Numbering and Other Unique Identifiers.** For files not produced in their native format, each page of a produced document shall have a legible, unique page identifier (“Bates Number”) electronically “burned” onto the TIF image in such a manner that information from the source document is not obliterated, concealed, or interfered with. There shall be no other legend or stamp placed on the document image unless a document qualifies for confidential treatment pursuant to the terms of a Protective Order entered by this Court in this litigation, or has been redacted in accordance with applicable law or Court order. In the case of confidential materials as defined in a Protective Order, or materials redacted in accordance with applicable law or Court order, a designation may be “burned” onto the document’s image at a location that does not obliterate or obscure any information from the source document. Any ESI produced in native data format shall be placed in a Logical Evidence Container that is Bates numbered, or the storage device (i.e., CD, USB, hard drive) containing such files shall be so Bates numbered. For purposes of further use in depositions, discussions or any court proceedings, the hash value of any document or ESI will constitute its unique controlling identifier. Alternately, if Bates numbers per document are desired, a spreadsheet may be created providing a Bates number to hash relationship.

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**H. Production Media.** Documents shall be produced on CD-ROM, DVD, external hard drive (with standard PC compatible interface), or such other readily accessible computer or electronic media as the parties may hereafter agree upon (the "Production Media"). Each item of Production Media shall include: (1) text referencing that it was produced in \_\_\_\_\_ (\*\*cv\*\*), (2) the type of materials on the media (e.g., "Documents," "OCR Text," "Objective Coding," etc.), (3) the production date, and (4) the Bates number range of the materials contained on such Production Media item. The documents contained on the media shall be organized and identified by custodian, where applicable.

**I. Electronic Text Files.** For files not produced in their native format, text files for produced documents shall be produced reflecting the full text that has been electronically extracted from the original, native electronic files ("Extracted Text"). The Extracted Text shall be provided in ASCII text format and shall be labeled and produced on Production Media in accordance with the provisions of paragraph II.H above, "Production Media." The text files will be named with the unique Bates number of the first page of the corresponding document followed by the extension ".txt."

**J. Metadata.** The parties agree that the production of Metadata produced will be provided in connection with native data format ESI requested, and includes without limitation, file, application and system metadata. Where non-native format data is produced, the following list identifies the Metadata fields that will be produced (to the extent available):

- Document number or Production number (including the document start and document end numbers). This should use the standard Bates number in accordance with those used in previous productions;
- BeginAttach;



- EndAttach;
- Title/Subject;
- Sent/Date and Time (for emails only);
- Last Modified Date and Time Created Date and Time (for E-docs);
- Received Date and Time (for emails only);
- Author;
- Recipients;
- cc;;
- bcc;;
- Source (custodian);
- Hash Value;
- File Path;
- Media (type of media that the document was stored on when it was collected);
- Page Count;
- Original File Name;
- Doc extension;
- Full Text;
- Accessed Date & Time; and
- Last Print Date.

**K. Attachments.** Email attachments and embedded files must be mapped to their parent by the Document or Production number. If attachments and embedded files are combined with their parent documents, then “BeginAttach” and “EndAttach” fields listing the unique beginning and end number for each attachment or embedded document must be included.

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**L. Structured data.** To the extent a response to discovery requires production of discoverable electronic information contained in a database, in lieu of producing the database, the parties agree to meet and confer to, with an understanding of which fields are relevant, agree upon a set of queries to be made for discoverable information and generate a report in a reasonably usable and exportable electronic file (e.g., Excel or CSV format) for review by the requesting party or counsel. Upon review of the report(s), the requesting party may make reasonable requests for additional information to explain the database schema, codes, abbreviations, and different report formats or to request specific data from identified fields.

#### **IV. OBJECTIONS TO ESI PRODUCTION**

**A.** For files not produced in their native format, documents that present imaging or format production problems shall be promptly identified and disclosed to the requesting party; the parties shall then meet and confer to attempt to resolve the problems.

**B.** If either party objects to producing the requested information on the grounds that such information is not reasonably accessible because of undue burden or cost, or because production in the requested format is asserted to be not reasonably accessible because of undue burden or cost, and before asserting such an objection, the responding party will inform the requesting party of the format in which it is willing to produce it, the nature and location of the information claimed to not be reasonably accessible, the reason(s) why the requested form of production would impose an undue burden or is unreasonably costly, and afford the requesting party 10 business days from receipt of such notice to propose an alternative means of compliance with the request. Such proposal may include alternative cost estimates for ESI discovery production, may offer a proposal for ESI discovery cost allocation, or both. Notwithstanding anything contained herein to the contrary, a producing party shall not produce ESI in a format

not requested or designated by the requesting party unless (i) the parties have met and conferred, and, having been unable to resolve such format production conflict at such meet and confer session, (ii) prior to referral to and resolution of such issue by the court.

C. If a party believes that responsive ESI no longer exists in its original format, or is no longer retrievable, the responding party shall explain where and when it was last retrievable in its original format, and disclose the circumstances surrounding the change in status of that ESI, including the date of such status change, the person or persons responsible for such state change, the reason or reasons such ESI is no longer retrievable in that format, and whether any backup or copy of such original ESI exists, together with the location and the custodian thereof.

#### **V. DESIGNATED ESI LIAISON**

The parties shall identify a person (“Designated ESI Liaison”) who is familiar with a party’s:

A. Email systems; blogs; social networking systems, instant messaging; Short Message Service (SMS) systems; word processing systems; spreadsheet and database systems (including the database’s dictionary, and the manner in which such program records transactional history in respect to deleted records); system history files, cache files, and cookies, graphics, animation, or document presentation systems; calendar systems; voice mail systems, including specifically, whether such systems include ESI; data files; program files; internet systems; and intranet systems.

B. Information security systems, including access and identity authentication, encryption, secure communications or storage, and other information and data protection and technology deployments, where appropriate.

C. Storage systems, including whether ESI storage is cloud, server based, or otherwise virtualized, and also including, without limitation, individual hard drives, home computers, “laptop” or “notebook” computers, personal digital assistants, pagers, mobile telephones, or removable/portable storage devices, such as CD-ROMs, DVDs, “floppy” disks, zip drives, tape drives, external hard drives, flash thumb or “key” drives, or external service providers.

D. Back up and archival systems, whether physical or virtualized, and including without limitation continuous data protection, business continuity, disaster recovery systems, whether such systems are onsite, offsite, maintained using one or more third-party vendors, or cloud based. The parties, including the designated ESI person(s), shall meet and confer to the extent necessary to discuss the back-up routine, application, and process and location of storage media, whether the ESI is compressed, encrypted, and the type of device or object in or on which it is recorded (e.g., whether it uses sequential or random access), and whether software that is capable of rendering it into usable form without undue expense is within the party’s possession, custody, or control.

E. Obsolete or “legacy” systems containing ESI and the extent, if any, to which such ESI was copied or transferred to new or replacement systems.

F. Current and historical website information, including uncompiled source code used to generate such web site information, customer information inputted by or through such current or historical web site information, and also including any potentially relevant or discoverable information contained on that or those site(s), as well as systems to back up, archive, store, or retain superseded, deleted, or removed web pages, and policies regarding allowing third parties’ sites to archive client website data.

G. All document and record retention policies addressing relevant ESI.

H. ESI erasure, modification, or recovery mechanisms, such as metadata scrubbers, wiping programs, and including without limitation other programs that destroy, repeatedly overwrite or otherwise render unreadable or uninterpretable all of or portions of real or virtualized storage media in order to render such erased information irretrievable, and all policies in place during the relevant time period regarding the use of such processes and software, as well as recovery programs that can defeat scrubbing, thereby recovering deleted, but inadvertently produced ESI.

I. Policies regarding document and record management, including the retention or destruction of relevant ESI for any such time that there exists a reasonable expectation of foreseeable litigation in connection with such documents and records.

J. “Litigation hold” policies that are instituted when a claim is reasonably anticipated, including all such policies that have been instituted, and the date on which they were instituted.

K. The identity of custodians of relevant ESI, including “key persons” and related staff members, and the information technology or information systems personnel, vendors, or subcontractors who are best able to describe the client’s information technology system.

The identity of vendors or subcontractors who store ESI for, or provide services or applications to, Defendant or any person acting on behalf of Defendant; the nature, amount, and description of the ESI stored by those vendors or subcontractors; contractual or other agreements that permit Defendant to impose a “litigation hold” on such ESI; whether or not such a “litigation hold” has been placed on such ESI; and, if not, why not.

**VI. PRIVILEGE AND WORK PRODUCT CLAIMS**

In an effort to avoid unnecessary expense and burden, the parties agree that, for documents redacted or withheld from production on the basis of attorney-client privilege, work product doctrine and/or any other applicable privilege, the producing party will prepare a summary log containing the file, system and application metadata information set forth herein, for each document, record, etc. (except for full text), to the extent such information exists.

Within a reasonable time following the receipt of such a summary log, a receiving party may identify particular documents that it believes require further explanation. The receiving party seeking further information shall explain in writing the need for such information and state precisely each document (by Bates number) for which it seeks this information. Within fourteen (14) days of such a request, the producing party must either (i) produce a full log for the requested documents or (ii) challenge the request. If a party challenges a request for further information, the parties shall meet and confer to try to reach a mutually agreeable solution. If they cannot agree, the matter shall be brought to the Court.

All other issues of privilege, including the inadvertent production of privileged or protected documents or information, shall be governed by the Protective Order entered by the Court in this litigation.

Dated: \_\_\_\_\_ By: \_\_\_\_\_

Dated: \_\_\_\_\_ By: \_\_\_\_\_